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Supreme Court, U.S.
FILED
JUL 5 1985
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO. 84-1736

MIGUEL HIJAR, SUPERINTENDENT,

PETITIONER,

V.

JAMES ROBERT BURRUS,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Respondent, JAMES BURRUS, pursuant to Rule 46 and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Memorandum in Opposition to Government's Petition for Writ of Certiorari without pre-payment of costs, and to proceed in forma pauperis. Respondent was represented by appointed counsel in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: 5 July 1985

Respectfully submitted,

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450 Golden Gate Avenue
San Francisco, California 94102
Telephone: (415) 556-7712

Counsel for Respondent BURRUS

No. 84-1736

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

MIGUEL HIJAR, SUPERINTENDENT,

v.

JAMES ROBERT BURRUS

MEMORANDUM IN OPPOSITION TO GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI

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MEMORANDUM IN OPPOSITION TO GOVERNMENT'S

PETITION FOR WRIT OF CERTIORARI

Facts. The facts and procedural posture of the case are accurately set out in the opinion of the court below. Petition, Appendix A, p. 1a. Most of the citations to the Excerpt of Record in the petition refer to facts stated in memoranda, letters, etc., many of which are patently conclusory in nature and do not reflect the source of the belief.[1] Since most references are not germane to this petition, it is not felt necessary to dispute their accuracy. Those facts necessary to resolution of the issue presented by this petition are set forth in the opinion below.

Discussion. Some of the confusion surrounding the government's petition stems from the mischaracterization of the question presented as whether a [federal] court has power to "enjoin [the] warden... on the ground that the indictment allegedly is invalid because of prior violations of the IAD by the requesting state...."

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1 For example, the government states as a fact that the delay in producing Burrus in Arizona was attributable to his refusal "to sign the forms necessary to effectuate his transfer." Petition, p.8. Petitioner cites two sources for this "fact": an affidavit of the prosecutor attached to a response to Burrus' motion to dismiss the indictment, and a letter from another state prosecutor relating what he had been told by Burrus' prison counselor (E.R. 150, 164). Also contained within the record was Burrus' explanation of why he had refused to sign the forms, and his difficulty with obtaining information on procedures from prison officials. While the record does not reflect that this factual dispute was ever resolved, the Arizona court granted Burrus' motion and dismissed the indictment with prejudice. Petition, Appendix I, p. 37a.

It would be unfortunate were this Court to grant a petition for writ of certiorari upon unproven statements of counsel taken from unverified pleadings. Since Burrus has prevailed in the Arizona trial court, there should be a presumption that the facts were decided in his favor, if any such facts are relevant to this petition.

The District Court did not hold the Arizona indictment invalid, notwithstanding the government's assertion that it did. It held no more than that it would violate federal law for the federal warden to surrender a federal prisoner to a state for the second time, when the state had violated the clear language of the Interstate Agreement. It seems to be the government's position that only the State of Arizona may determine, after the prisoner's retransfer in violation of the agreement, whether or not it had in fact violated the agreement in the first instance.[2] This is indeed suggesting that only the fox has jurisdiction to guard the chicken-coop.

This Court has held that the Interstate Agreement on Detainers is a federal law subject to federal construction. Cuyler v. Adams, 449 U.S. 433 (1981). It seems axiomatic that a federal court has jurisdiction to determine whether a federal prisoner's rights would be violated were he surrendered to a requesting state in violation of the Detainer Agreement. In Cuyler, supra, the Court acknowledged the import of Article IV (d), protecting "any right [the prisoner] may have" other than the lack of the governor's approval. This Court stated:

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2 The Arizona trial court held that article III was indeed violated by the failure of Arizona to try the respondent within the time limits of the agreement, and that since the "matter [was] well beyond the last day for trial," the indictment should be dismissed. Petition, Appendix I, p. 37a. That decision is now on appeal before the Arizona Court of Appeals.

The Arizona Court of Appeals, Division One, observed that this case would be moot if the decision of the Court of Appeals were final. In view of the then pendency of a petition for rehearing and contemplated petition for writ of certiorari to this Court, the Arizona appellate court continued the matter under advisement "until the decision in Burrus v. Turnbo is final." Petition, p. 40a.

Since no stay of mandate was requested by the United States or granted by the Court of Appeals, the decision became final on January 23, 1985, the date on which the mandate in the case below was filed in the District Court. At the present time, there is apparently no charge pending in Arizona, nor is there any detainer placed against the respondent.

> The remedial purpose of the Agreement supports an interpretation that gives prisoners the right to a judicial hearing in which they can bring a limited challenge to the receiving state's custody request. In light of the purpose of the Detainer Agreement, as reflected in the structure of the Agreement, its language, and its legislative history, we conclude as a matter of federal law that prisoners transferred pursuant to the provisions of the agreement are not required to forfeit any pre-existing rights they may have under state or federal law to challenge their transfer to the receiving State.
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> 449 U.S. at p.449.

States that are signatories to the compact are put on notice of the mandatory language of the agreement that if trial is not had prior to the return of the prisoner to the original place of imprisonment, "such indictment....shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." [IAD, Article III (d)]

Implicit in the above article is the recognition that the prisoner has been returned prior to trial. To adopt the government's suggestion that the prisoner must be "shuttled" back to the requesting state upon a second request so that the offending state may determine whether it has violated the agreement flies in the face of logic and the rationale of this Court's holding in Cuyler, supra.

It is significant that the Interstate Agreement recognized this problem when it provided in Article V (c) that failure to bring a prisoner to trial within the required time framework shall result in a dismissal with prejudice by the appropriate court of the jurisdiction where the indictment ... has been pending ..." [Emphasis added]. This language recognizes that the prisoner is then before the court in which his speedy trial rights were violated. Conversely, where there is a return to the place of original imprisonment, the prisoner is back in the sending jurisdiction, and the Interstate Agreement does not

contain any limiting language specifying which court shall act. In any event, Article III states unequivocally that the "indictment ...shall not be of any further force or effect..." and it follows, a fortiori, that any detainer based thereon is unenforceable under the spirit of the agreement.

The District Court simply held that, under the clear terms of the agreement, the detainer was of no further force and effect and that it would violate the agreement to permit Burrus's transfer to Arizona for trial.

States are not powerless to comply with the terms of the agreement. Two obvious alternatives were available: (1) obtain a written waiver by the prisoner to be returned to his original place of confinement pending the appeal, or (2) expedite the appeal. No effort was made to do either. It is implicit in the agreement that the sanctions are harsh. Otherwise, unnecessary delays will become the rule rather than the exception. See for example, the perceptive discussion by the late James V. Bennett in "The Last Full Ounce", 23 Fed. Prob. 20 (June 1959).

One final clarification of an assertion in the government's brief: Burrus was not returned to his original place of confinement "in accordance with [his] wishes." Petition, p.4. Burrus requested that he be released to federal custody in Arizona for medical treatment and access to legal materials. He was not released pursuant to that request. In fact, his request for transfer was ignored, and he was only returned to the place of confinement after the charges were dismissed by the Arizona court.[3] Of course, any transfer of custody to the United States Marshal awaiting trial in Arizona is not a "return of the prisoner to the original place of imprisonment." Federal prisoners may appear in state courts pursuant to the agreement in

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[3] The dismissal on Arizona speedy trial grounds which resulted in respondent's return to his original place of imprisonment was reversed on appeal.

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AFFIDAVIT OF MAILING

James F. Hewitt, a member of the bar of this Court, certifies that pursuant to Rule 28 of this Court, he filed and served the within Memorandum in Opposition to Government's Petition for Writ of Certiorari with the Clerk of this Court and on counsel for petitioner, respectively, by depositing said memorandum, and copies thereof, in the United States Mails at San Francisco, California, on July 5, 1985, first class, postage pre-paid within the time allowed for filing.

Service was made upon counsel for petitioner at the following address:

Honorable Rex Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

JAMES F. HEWITT
Federal Public Defender

Counsel for Respondent BURRUS

Subscribed and sworn to before me
on this 3 day of July, 1985

Deputy Clerk, United States District Court

federal custody.[4] Congress recognized this possibility, when it was observed in the Senate Report on the bill (Sen. Rep.91-1356):

> In the case of a federal prisoner, the prosecution will be entitled to temporary custody as provided by the agreement or to the prisoner's presence in Federal custody at the place of the trial, whichever arrangement may be approved by the custodian.

1970 U.S. Code Congress & Administrative News, p.4865

Contrary to the government's suggestion, this is not a case of significant recurrence justifying this Court's intervention to clarify an important question of statutory interpretation. Nor is there a conflict in the circuits on the issue; rather, it is a problem that rarely occurs. This is obviously because most states, realizing the strict requirements of the agreement, are careful to meet its provisions.

It must be remembered that the issue below was a narrow one. As stated by the Court of Appeals:

> The case before us is not an appeal from a judgment on the merits of the charges that Arizona has preferred against Burrus. Instead, it is an appeal from the district court's determination that the United States will participate in a violation of article III if the Warden transfers Burrus back to Arizona.

Opinion, Petition, p. 16a.

A federal district court has interpreted federal law as it affects a federal prisoner. The judgment was affirmed by the Court of Appeals limited to that issue. The government seeks to

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[4] Article V(a), IAD.

make the case a broad attack upon the rights of states under the Interstate Agreement. It should not be permitted to use this narrow decision for that purpose. The petition for writ of certiorari should be denied.

Respectfully Submitted,

JAMES T. HEWITT
Federal Public Defender

Counsel for Respondent